OPINION EVIDENCE.

THERE are few questions in practice more perplexing to courts or that produce more conflict of views than the admissibility of opinions as evidence in the trial of issues of fact. The general principle that witnesses must testify to facts and not inferences or opinions is so deeply rooted and grounded in the judicial and professional mind that it is very difficult sometimes to recognize the exceptions to the rule or to apply them to particular cases. These exceptions as they were outlined and understood in the ancient common law have been much enlarged in our day, or at least applied in practice with greater freedom and liberality. The growth of knowledge and the vast progress attained in every field of human activity must always require the application by the courts of old principles to new conditions. Amid the restless activity and marvelous progress of these days in every department of human exertion, the methods of administering justice and ascertaining truth cannot remain stationary. Knowledge is power and its all-pervading influence must necessarily affect rules for the determination of controverted questions of fact. It cannot be denied that scientific, mechanical and professional knowledge, or even superior knowledge and experience in some matters outside the range of what might be properly called scientific inquiry, are helpful to the common mind in the investigation of matters of fact in judicial proceedings. The rule which permits the courts to make use of such instrumentalities in the administration of justice is open to such great abuses that all opinion or expert testimony has been much discredited on account of the unseemly and loquacious wrangling which results from its introduction, and the tedious and unprofitable length of trials in which it is a feature. But, after all, the objections that have been so often and so forcibly urged to this kind of evidence apply in a great measure to the narration of facts and all human testimony. The witness who testifies to a fact may be ignorant, or interested, or willfully false or mistaken. It is entirely safe to assert that justice is

quite as frequently perverted by a false, mistaken or colored statement of facts from witnesses as it is in consequence of all the objections that have been or can be urged against the opinions of experts, and so, notwithstanding the prejudices of the courts and the profession, and the unfavorable criticism of the public, it may be said the practice of bringing to the aid of the Court or jury expert knowledge of the process of ascertaining the truth concerning certain disputed questions of fact has grown rather than diminished. In this age the knowledge of experts, and, indeed, superior skill or experience, in any of the various walks of life count for much, and there is no good reason why courts should refuse to be aided by such means in the search for truth in proper cases any more than individuals. The fact that testimony of this character is sometimes used to prevent or delay justice, or to protract the investigation, is no argument against its usefulness in proper cases and within proper limitations. The circumstance that the rule has been abused in cases where medical experts or experts in handwriting are called, does not prove that it ought to be abolished or that on the whole it is not a useful one.

It has been often suggested that witnesses who appear as experts to testify to opinions should be appointed by the courts or some public authority. Any safeguards that would secure the independence and impartiality of the witness would, of course, be desirable, but the scheme of creating a body of official experts to be called in when needed would seem to be impracticable. It would, of course, be impossible to select any person with sufficient knowledge of the several professions or vocations in life from which experts may be called who would be qualified to testify in all cases, and, hence, the selection would have to be made for each particular case. It would be very difficult, if not impossible, to formulate any plan for the appointment of experts by the courts or any other public authority that would in practice be found convenient or even practicable. On the whole, it would seem to be wiser to leave the selection of such witnesses to the parties themselves, and the rules under which such testimony is admissible, as well as its real weight and value in all cases, to the good sense and judgment of the courts. An attempt to regulate the practice

in this respect by statute, or any arbitrary rule, would be more likely to aggravate whatever evils now exist than to improve the law. It would be entirely practicable, however, to abolish an evil involved in the practice to which much of the scandal and adverse criticism, of which testimony of this kind is the subject may be attributed. The enormous fees which experts have been permitted to charge for their services as witnesses and which the parties to the litigation are willing to pay them, not only furnishes a strong temptation to the witness to consume valuable time and to becloud the question at issue with theories and suggestions that tend rather to obscure than to bring out the truth, but it destroys the value of their testimony in the minds of the jury. When the compensation is regulated by law and reduced to such moderate limits as to remove the temptation suggested, the professional expert will not appear so frequently, will consume much less time than now, and his opinion will have more weight with the jury. There is something unseemly and scandalous in the present practice, to which not only private litigants, but even public officers resort, of hiring experts by contract, express or implied, to testify in civil and criminal cases. There is no more reason why a person who happens to possess special knowledge upon some subject should not be compelled by the process of the Court to appear and testify in aid of the administration of justice, than there is for relieving him from the duty of serving as a juror, or any other duty which the law enjoins upon the citizen. In this respect the law in its present condition would be greatly improved by judicious legislation.

The general rules under which the opinions of witnesses may be received are now quite well settled and understood. In the first place it must be shown that the witness is qualified by learning, experience or observation to express an opinion upon the question at issue. The qualification of the witness in such cases presents a preliminary question of fact for the determination of the trial Court and when determined upon some evidence is not ordinarily open to review upon appeal.[1] The witness may

[1]Nelson *v.* Sun Mutual Insurance Co., 71 N. Y., 454.

express an opinion upon a state of facts that are either within his personal knowledge or observation, or have been presented to his mind by means of a hypothetical question embracing the facts upon which the opinion is to be based;[1] and it is no objection to evidence of this character that the question propounded to the witness is the precise question the jury is to determine[2]. On the contrary, it has been said that this would rather seem to be a good reason for the admission of the testimony. If the witness can add instruction beyond what the jury are able to obtain from the data before them it is no objection that the witness refers to the precise matter in issue.[3]

When it is sought to obtain the opinion of the witness by means of a hypothetical question, it is important that the question should be stated in brief and clear language. Much of the confusion and delay incident to this class of evidence result from the careless and imperfect manner in which such questions are framed. They are frequently framed more with the view of confusing the witness than of eliciting the truth or testing his qualifications, or the correctness of his conclusions. The language is usually involved and spun out to such an interminable length that the witness can seldom comprehend the real meaning of the inquiry, and ever the examiner himself is in doubt as to its real scope and object. The administration of justice would be promoted by some change in the law that would authorize and require the presiding judge to supervise the framing of the question. In that way it could be confined within reasonable and proper limits, expressed in appropriate terms and made applicable to the facts. The court, the witness and the jury would then be more likely to appreciate the true point of the inquiry and the effect of the answer, and thus much valuable time would be saved. It is not at all likely that the courts or the legislature will take any backward steps with respect to the admission of the opinions witnesses in proper cases, and hence it would be desirable to guard against some of the evils of which the

[1] Reynolds *v.* Robinson, 64 N. Y., 589; Cole *v.* Fall Brook Coal Co., 159 N. Y., 59.

[2] Van Wycklen *v.* City of Brooklyn, 118 N. Y., 424.

[3] 1 Greenleaf's Ev., § 441, Ed. 1899.

courts, the profession and the public have reason to complain.

The most difficult element in this question, and that which gives the most trouble to the courts, is to determine in what cases and upon what questions or subjects opinions are admissible. Generally, it may be asserted that they are admissible upon all questions involving scientific, professional or mechanical knowledge. They are also admissible in many cases not falling within this classification, where the inquiry involves special knowledge, skill, experience or observation, and generally on questions of value. The cases in which opinions are not admissible are those where the issue involves no question of science, professional knowledge or special skill or observation, but simply matters of common knowledge relating to the ordinary affairs of life, and as to which one person is just as capable of drawing the proper conclusion as the other. In such cases it has often been said that the witness can only state the facts, leaving the conclusion to be drawn by the court or the jury. There is rarely any difficulty in cases that clearly fall within one or the other of the two groups referred to. But between the limits clearly indicated by the lines that mark the cases thus classified is a large disputed territory, the limit of which is very imperfectly defined. It is not always easy to distinguish the questions that are within the domain of common knowledge and observation from those that are not. It often occurs in practice that questions arising in the ordinary affairs of life, and which in some sense are familiar to every one, depend for their solution upon descriptive facts that the witness is unable to express in such a way as to put the jury in his place, so that the correct picture of the transaction will be presented to their minds. The passion of anger or affection for another, or the condition of intoxication, cannot always be described in words without the expression of an opinion, and in such cases it is not objectionable,[1] for the reason that the witness in such cases is better able to draw the correct inference than the jury. There is a large class of questions concerning which it is held that witnesses

[1] Blake *v.* The People, 73 N. Y., 586, 1 Greenleaf's Ev., *supra.*

may express opinions, although in a large sense they would seem to be matters of common knowledge and observation, Thus it was held that a witness might give his opinion whether threshing machines were constructed in a good and workmanlike manner;[1] whether a cobble stone wall was properly built;[2] whether it was customary to have guards upon draw bridges;[3] whether certain cabinet work was well done and a good job;[4] how much a given field would yield to the acre;[5] whether a scow was seaworthy;[6] whether a test applied to fire hose was a fair one;[7] whether it would be safe or prudent for a tug boat to tug three boats abreast in a high wind upon a bay or arm of the sea;[8] whether tunneling near other property would cause the earth to settle and slide;[9] whether certain soils would resist the percolation of water;[10] whether the walls of a building were sufficient to sustain it;[11] whether the use of machinery on the third floor of a building would have the effect of weakening the walls;[12] whether a staging erected in a specified way can be safely trusted to carry a particular load.[13]

These decisions illustrate a large class of cases that are very near to the boundary line. The cases in which opinions are inadmissible are those where the inquiry is a matter of common knowledge or observation, and are well illustrated by the discussion in Ferguson *v.* Hubbell (97 N. Y., 507). In that case witnesses were permitted to give opinions whether it was a proper time in the year to set fire to a fallow from which the fire spread to the plaintiff's land. That was clearly a question for the jury when all

[1] Curtis *v.* Gano, 26 N. Y., 426.
[2] Pullman *v.* Corning, 9 N. Y., 93.
[3] Hart *v.* Hudson River Bridge Co., 84 N. Y., 56.
[4] Ward *v.* Kilpatrick, 84 New York, 414.
[5] Philips *v.* Terry, 2 Abb. Ct., App. Dec., 607.
[6] Baird *v.* Daly, 68 N. Y., 547.
[7] Chicago *v.* Greer, 76 U. S., 726.
[8] Transportation Line *v.* Hope, 95 U. S., 297.
[9] Clark *v.* Willett, 33 Cal., 534.
[10] Buffum *v.* Harris, 5 R. I., 243.
[11] Cont. Ins. Co. *v.* Pruitt, 65 Tex., 125.
[12] Turner *v.* Hoar, 114 Mo., 345.
[13] Prendible *v.* Mfg. Co., 160 Mass., 131.

the facts and circumstances had been disclosed, and it is seldom that any controversy will arise in so plain a case. The trend of judicial decisions in recent times is in the direction of more liberality in admitting opinion evidence. When the question is of such a character that a court or jury may be aided by the learning and skill of experts, or by superior knowledge and experience concerning the matter in controversy, even though in a general sense the inquiry may not relate to a subject within the domain of science, the opinion of a qualified witness is generally admissible. It frequently happens in practice that the facts which surround the question are so complicated or indistinct that the jury may not be able to grasp them or to draw the proper inference. In such cases a competent expert will be better able to comprehend the real situation and thus his opinion is helpful in the solution of the question.

The consensus of judicial opinion is decidedly unfavorable with respect to the force or value of this species of evidence, and undoubtedly it is open in this respect to all the criticism that it has received from the courts. In many cases the witness, from causes that have been mentioned, becomes an interested partisan on the side of the case to which he owes his employment and is generally confronted with one equally interested on the other side. In the conflict of opinions that generally follows, the jury frequently find their way out of the difficulty by disregarding all evidence of this character. It is discredited from the beginning largely in consequence of the means by which it has been obtained. It remains true, however, that if the abuses incident to the presentation of such evidence could be removed, the opinion of a capable and disinterested expert would frequently be of great value in the investigation of questions of fact. It would be much easier and wiser to root out these abuses than to dispense with this kind of evidence altogether.

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